Supreme Court, U.S.
FILED
SEP 30 1997
CLERK

No. 96-8653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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39 pp

QUESTION PRESENTED

Is the Confrontation Clause of the Sixth Amendment complied with when a nontestifying codefendant's confession, redacted to exclude the defendant's name by substituting the words "deleted" and "deletion," is introduced at a joint trial accompanied by an instruction to the jury not to consider the confession against the defendant?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED ... 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 9
ARGUMENT 11

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS COMPLIED WITH WHEN A NONTESTIFYING CODEFENDANT'S CONFESSION, REDACTED TO EXCLUDE THE DEFENDANT'S NAME BY SUBSTITUTING THE WORDS "DELETED" AND "DELETION," IS INTRODUCED AT A JOINT TRIAL ACCOMPANIED BY AN INSTRUCTION TO THE JURY NOT TO CONSIDER THE CONFESSION AGAINST THE DEFENDANT 11

A. *Bruton* and *Richardson* Provide the Framework for Determining Whether the Admission of a Confession at a Joint Trial Incriminates the Nonconfessing Defendant in Violation of the Confrontation Clause of the Sixth Amendment 11

Page

B. The Compelling Policy Considerations Supporting the Court's Ruling in *Richardson* Apply Equally to Redactions that Substitute Blanks or Neutral References for the Defendant's Name. 13

C. A Codefendant's Confession Redacted by Substituting Blanks or Neutral References for the Defendant's Name Does Not Facially Incriminate the Defendant. 18

D. The Trial Court's Cautionary Instruction to the Jury Not to Consider Bell's Confession Against Gray Ensured that the Jury Would Properly Limit Its Consideration of that Evidence. 22

E. Even Under a Contextual Implication Analysis, It Was Not Overwhelmingly Probable that the Jury Would be Unable to Follow a Limiting Instruction Not to Consider Bell's Statement Against Gray 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

Cases:

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994) 15
Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 20
Bourjaily v. United States, 483 U.S. 171 (1987) 21
Bruton v. United States, 391 U.S. 123 (1968) . . . . . 9, passim
California v. Green, 399 U.S. 149 (1970) 21
Chambers v. Mississippi, 410 U.S. 284 (1973) 21
Commonwealth v. Rawls, 419 A.2d 109 (Pa. Super. 1980), *appeal dismissed*, 452 A.2d 1347 (Pa. 1982) 29
Donnelly v. DeChristoforo, 416 U.S. 637 (1974) . . . 25
Dutton v. Evans, 400 U.S. 74 (1970) 21
Ewish v. State, 871 P.2d 306 (Nev. 1994) 16
Gacy v. Welborn, 994 F.2d 305 (7th Cir.), *cert. denied*, 510 U.S. 899 (1993) 24
Gray v. Maryland, 107 Md. App. 311, 667 A.2d 983 (1995) 1
Harris v. New York, 401 U.S. 222 (1971) 17, 23
Harris v. State, 462 S.E.2d 425 (Ga. App. 1995) 29
Huddleston v. United States, 485 U.S. 681 (1988) . . . 23
James v. Illinois, 493 U.S. 307 (1990) 21
Marshall v. Lonberger, 459 U.S. 422 (1983) 20
Maryland v. Craig, 497 U.S. 836 (1990) 20
Maryland v. Gray, 344 Md. 417, 687 A.2d 660 (1997) 1
Michigan v. Tucker, 417 U.S. 433 (1974) 17

Page

Miranda v. Arizona, 384 U.S. 436 (1966) 17
Moran v. Burbine, 475 U.S 412 (1986) 17
Oregon v. Hass, 420 U.S. 714 (1975) 17
People v. Fletcher, 917 P.2d 187 (Cal. 1996) 29
People v. Rainge, 445 N.E.2d 535 (Ill. App. 1983), *cert. denied*, 467 U.S. 1219 (1984) 16
People v. Ricardo B., 535 N.E.2d 1336 (N.Y. 1989) . 16
Richardson v. Marsh, 481 U.S. 200 (1987) .. 9, passim
Romano v. Oklahoma, 512 U.S. 1 (1994) 23
Scarborough v. State, 437 A.2d 672 (Md. App. 1981), *cert. denied*, 292 Md. 639 (1982) 16
State v. Corsi, 430 A.2d 210 (N.J. 1981) 16
State v. Watson, 397 So. 2d 1337 (La.), *cert. denied*, 454 U.S. 903 (1981) 16
United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990) 29
United States v. Donahue, 948 F.2d 438 (8th Cir. 1991), *cert. denied*, 503 U.S. 976 (1992) 28
United States v. Havens, 446 U.S. 620 (1980) 21
United States v. Lane, 474 U.S. 438 (1986) 15
United States v. Nixon, 418 U.S. 683 (1974) 20
United States v. Nobles, 422 U.S. 225 (1975) 20
United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973) 16
United States v. Washington, 431 U.S. 181 (1977) .. 17
United States v. Washington, 952 F.2d 1402 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1009 (1992) 28
Williamson v. United States, 512 U.S. 594 (1994) ... 3
Yee v. City of Escondido, 503 U.S. 519 (1992) 25
Zafiro v. United States, 506 U.S. 534 (1993) 15

Page

Constitutional Provision:

U.S. CONST. amend. V 17
U.S. CONST. amend. VI ..... i, passim

Statute:

28 U.S.C. § 1257(a) 1

Rule:

Federal Rule of Evidence 106 20

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland is reported, *Maryland v. Gray*, 344 Md. 417, 687 A.2d 660 (1997), and is reproduced in the joint appendix. (J.A. 88-108).

The opinion of the Court of Special Appeals of Maryland reversing the judgment of the trial court is reported, *Gray v. Maryland*, 107 Md. App. 311, 667 A.2d 983 (1995), and is reproduced in the joint appendix. (J.A. 69-87).

The unreported opinion of the Circuit Court for Baltimore City, Maryland, denying petitioner's motion for severance is reproduced in the joint appendix. (J.A. 7-9).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland and affirming petitioner Gray's conviction was filed on January 15, 1997. The petition for writ of certiorari was filed in this Court on April 15, 1997, and granted on June 16, 1997.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Six young men beat Stacey Williams to death on November 10, 1993 in Baltimore, Maryland. Petitioner Kevin Gray, Anthony Bell, Jacquin Vanlandingham (known as "Tank"), and several other unidentified individuals chased the victim down the street immediately before the beating. (Tr. 6/21/94, at 91). Tank hit the victim in the mouth and then picked him up and dropped him on his head. (*Id.* at 112-13, 120-22). Gray, too, lifted the victim up and dropped him head-first onto the ground. (*Id.* at 113-14, 120-22). After dropping the victim on his head three times, the young men "stomped" and kicked the victim repeatedly in the neck and head. (*Id.* at 114). After the beating, Bell and Tank grabbed the victim by his neck and dragged him to his girlfriend's house. (*Id.* at 122).

Several hours after the beating, the victim went into seizures and was transported to the hospital. (*Id.* at 123-24, 229). He died the next day of brain trauma and injuries caused by being struck in the head and by his head's striking a hard surface, such as cement or asphalt. (*Id.* at 229).

Bell gave a written statement to the police implicating himself, Gray, Tank, and a "few other guys" in the victim's

death. (J.A. 10-12, 57-60). Other evidence at trial also showed that as many as six persons were involved in the crime. (Tr. 6/21/94, at 114). Gray gave an oral statement to the police in which he denied his involvement in the beating and claimed to have been speaking on a pay telephone when the beating occurred. (Tr. 6/22/94, at 38).

Gray and Bell were scheduled to be tried jointly.[1] Before trial, Gray's attorney moved to exclude Bell's statement from evidence. (J.A. 3).[2] When the trial court suggested redacting the confession to eliminate the names of the persons identified by Bell, counsel for Gray argued that because the statement showed that the beating was a group activity, the jury could nonetheless infer that Gray was one of the persons named by Bell. (J.A. 3). Gray also moved to have his case severed from Bell's, claiming that Bell's statement could only be interpreted by the jury as referring to Gray as one of the participants in the crime. (J.A. 4). If the cases were tried together, Gray argued, he would be denied his right of confrontation because he would be foreclosed from cross-examining Bell about the statement. (J.A. 4).

The trial judge denied the severance motion, saying:

> All right. It seems to me in that light, that there is not a difficulty here with a statement which

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[1] Tank was fatally shot two days after the incident. (Tr. 6/22/94, at 147-48).

[2] The prosecutor made no attempt at trial to introduce Bell's statement against Gray. Accordingly, any issue relating to the use of Bell's confession as substantive evidence against Gray, *see Williamson v. United States*, 512 U.S. 594 (1994), is not before the Court.

involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant [Gray].

To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

(J.A. 7-8).

When defense counsel expressed concern that the jury would have only "one other person to choose from because there are not five or six people on trial," the trial judge stated that he would instruct the jury not to consider that the other persons alleged in the statement to have been involved in the crime were not on trial. (J.A. 8). The court also agreed to instruct the jury not to speculate why the other individuals were not on trial and not to consider Bell's statement as evidence against Gray. (J.A. 8-9).

At the joint trial, the prosecution admitted a redacted version of Bell's statement through Detective Homer Pennington, who had interrogated Bell. Before the redacted statement was read into evidence, the judge instructed the jury as follows:

Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

(J.A. 10).

Bell's statement was then read aloud to the jury:

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted, deleted*, and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted, deleted*, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it.

(J.A. 11-12) (emphasis added).[3] The copy of the statement

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[3] There is a minor discrepancy, immaterial to the issue before this Court, between the transcription of Bell's statement

admitted into evidence had blank white spaces where the names once appeared. (J.A. 65-68).

Gray testified in his own defense and claimed to have been speaking to his girlfriend on a nearby pay telephone at the time of the beating. (Tr. 6/23/94, at 5-6, 15). Gray called two other witnesses to support his claim that he was not involved in the beating. (Tr. 6/22/94, at 176-77, 189-91). Bell did not testify at the joint trial.

In its instructions at the close of all the evidence, the trial court reminded the jury:

> You must consider the evidence as it relates to each defendant separately and you must consider separately each offense charged against each defendant. A separate verdict must be returned for each charge against each defendant.
>
> In this connection some of the evidence was admitted only against one of the defendants and not against the other defendant. You must consider such evidence only as it relates to the defendant against whom it was admitted. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

(J.A. 14). The judge also admonished the jury: "[Y]ou should not concern yourself with the fact that others who may be implicated in the criminal offenses are not before

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in the trial transcript and the transcription contained in the joint appendix. The trial transcript reads: "Question, do you know the other guy's name?" (J.A. 11). That same sentence in the transcribed statement contained in the joint appendix reads: "(Q) Do you have the other guys names." (J.A. 62).

you for trial." (J.A. 18).

The jury found Gray and Bell guilty of involuntary manslaughter. (Tr. 6/24/94, at 2-3). Gray received a sentence of ten years, three of which were suspended in favor of five years of supervised probation effective upon his release. (Tr. 8/1/94, at 24).

Gray's conviction was reversed by the Court of Special Appeals of Maryland. (J.A. 87). The state intermediate appellate court held that there was a substantial risk that the jury would consider the confession as evidence of Gray's guilt because the words "deleted" and "deletion" did not render the statement nonincriminating as to Gray. (J.A. 83-84). Adopting a "contextual linkage" analysis, the court concluded that Gray's role in the crime was "clearly demonstrated" by his codefendant's confession and, therefore, Gray's constitutional right of confrontation was violated by its admission into evidence. (J.A. 84).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals, rejecting the contextual implication approach employed by that court. (J.A. 105, 107). Maryland's high court adopted instead a version of the "facial implication" doctrine, which provides that a defendant's right of confrontation is satisfied when a codefendant's confession is redacted so that it does not "facially, or by compelling and inevitable inference, inculpate" the defendant. (J.A. 105). The Court of Appeals held that, as redacted, Bell's confession did not facially implicate Gray. (J.A. 106). Thus, admission of the confession into evidence, coupled with the limiting instruction, did not offend Gray's right of confrontation. (J.A. 106).

SUMMARY OF ARGUMENT

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court resolved the question whether redaction of a codefendant's confession to eliminate any reference to the existence of the nonconfessing defendant satisfies the latter's right of confrontation when the jury is instructed to consider the confession only against the confessor. In holding that the Confrontation Clause was satisfied, the Court rejected a "contextual linkage" analysis in favor of a "facial implication" approach. This approach focuses solely on the redacted confession and does not consider any links to the defendant supplied by other evidence in the case. Undergirding the Court's decision in that case were important policy considerations, including the preference for joint trials, the desirability of verdict consistency, and the practical difficulties attendant to use of a contextual linkage approach.

Although the Court left open in *Richardson* the precise question here, i.e., whether the Confrontation Clause is satisfied by substituting neutral references for the nonconfessing defendant's name, the logic of *Richardson* compels an affirmative answer to that question. The identical policy considerations addressed in *Richardson* are at issue here. More importantly, redaction by use of neutral references minimizes the possibility that the jurors will ignore a proper limiting instruction. *See Richardson*, 481 U. S. at 206. Certainly, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s[4] exception to the general rule."

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[4] *Bruton v. United States*, 391 U.S. 123 (1968).

Richardson, 481 U.S. at 208. Indeed, whenever a confession is redacted to eliminate the defendant's name or its functional equivalent, *Bruton* and *Richardson* are satisfied.

In this case, the codefendant's confession was redacted to eliminate Gray's name, the only identifying reference to him. As redacted, the codefendant's confession did not facially incriminate Gray, even though the confession on its face indicated that others, b_sides the confessor, were involved in the crime. Under the analysis set forth in *Richardson*, there was not an overwhelming probability that the jury would be incapable of following an instruction to consider the confession only against the codefendant. Thus, the redaction, coupled with the cautionary instruction, safeguarded Gray's rights under the Confrontation Clause.

Even if the codefendant's confession were viewed in the context of other evidence adduced at trial, its admission against Bell did not violate the Confrontation Clause. Given the manner of redaction, the number of persons involved in the crime, and the conflicts in the testimony, it was not overwhelmingly probable that the jury would be incapable of following the trial court's instructions.

ARGUMENT

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS COMPLIED WITH WHEN A NONTESTIFYING CODEFENDANT'S CONFESSION, REDACTED TO EXCLUDE THE DEFENDANT'S NAME BY SUBSTITUTING THE WORDS "DELETED" AND "DELETION," IS INTRODUCED AT A JOINT TRIAL ACCOMPANIED BY AN INSTRUCTION TO THE JURY NOT TO CONSIDER THE CONFESSION AGAINST THE DEFENDANT.

A. *Bruton* and *Richardson* Provide the Framework for Determining Whether the Admission of a Confession at a Joint Trial Incriminates the Nonconfessing Defendant in Violation of the Confrontation Clause of the Sixth Amendment.

In *Bruton v. United States*, 391 U.S. 123, 135-37 (1968), this Court held that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial. Underlying the Court's holding was the concern that the trial court's cautionary instruction to the jury could not overcome the substantial risk that the jury would consider the incriminating confession against the confessor's codefendant. *Id.*

Nineteen years later, in *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court clarified that *Bruton* was limited to situations in which facially incriminating statements made

by codefendants are used at trial. The Court recognized that "the [*Bruton*] calculus changes when confessions that do not name the defendant are at issue." *Richardson*, 481 U.S. at 211. Because the confession in *Richardson* was not "incriminating on its face," as had been the confession in *Bruton*, but became incriminating only when tied to other evidence adduced at trial, the court's limiting instructions were likely to prevent the jury from inferring the guilt of the defendant from the codefendant's confession. *Richardson*, 481 U.S. at 208.

Read together, *Bruton* and *Richardson* impart four principles that guide the analysis of the issue presented by this case. First, the Confrontation Clause is violated by the admission of a nontestifying codefendant's confession that expressly incriminates the defendant by name or other identifying reference, notwithstanding a limiting instruction that the confession be used only against the defendant who made it. *Richardson*, 481 U.S. at 208, 211; *Bruton*, 391 U.S. at 135-36. Second, *Bruton* established a "narrow exception" to the "almost invariable assumption of the law" that juries can be trusted to follow the trial court's instructions; that assumption applies to the admission of codefendant confessions that are redacted to eliminate references to other defendants. *Richardson*, 481 U.S. at 206-08. Third, the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession, with a proper limiting instruction, when the confession is redacted so that it does not facially incriminate the nonconfessing defendant. *Id.* at 211. Fourth, the question whether a nontestifying codefendant's confession implicates the defendant is to be determined from the text of the confession alone, not by reference to other evidence in the case (the "contextual implication" or

"evidentiary linkage" approach). *Id.* at 208-09. The first two principles are not in dispute; the latter two principles lie at the heart of this case.

B. The Compelling Policy Considerations Supporting the Court's Ruling in *Richardson* Apply Equally to Redactions that Substitute Blanks or Neutral References for the Defendant's Name.

This Court in *Richardson* rejected the contextual implication approach to determining whether a confession, redacted to eliminate all references to the nonconfessing defendant's existence, incriminates the nonconfessing defendant in violation of *Bruton*. The Court instead adopted the facial implication doctrine, which provides that only those confessions that on their face directly inculpate codefendants raise Confrontation Clause concerns. *Richardson*, 481 U.S. at 208. Where the incrimination is only inferential, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* In other words, where the defendant's culpability is established only by viewing the codefendant's confession in conjunction with other evidence in the case, "there does not exist the overwhelming probability" of the jury's inability to obey the court's instructions "that is the foundation of *Bruton*'s exception to the general rule." *Id.* The Court thus made plain in *Richardson* that the analysis focuses exclusively on the confession, not its contextual implications.

The Court's rejection in *Richardson* of the contextual implication analysis in favor of the facial implication

approach was driven, in part, by compelling policy considerations. Those considerations apply equally to redactions that replace the nonconfessing defendant's name, or the functional equivalent thereof, with a blank or neutral reference. First, whereas facial incrimination is curable by redaction that eliminates references to coparticipants, there is no effective way to redact a confession that is incriminating to the nonconfessing codefendant only when tied to other evidence. *Richardson*, 481 U.S. at 209. With *Bruton* limited to facially incriminating confessions, redaction is a simple way to comply with its dictates—a suggestion made by the *Bruton* opinion itself. *Richardson*, 481 U.S. at 208-09, *citing Bruton*, 391 U.S. at 134 n.10.

Second, if a contextual implication approach were used, then a trial judge who is asked to rule on motions to exclude the confession or to sever the trials would be burdened with the task of considering not only the confession itself but also other evidence, which typically will not yet have been presented. *Richardson*, 481 U.S. at 209. It would often be impossible for a trial judge to predict the admissibility of a confession in advance of the trial. *Id.* To remedy the situation, the trial judge would be faced with the choice of having to (1) assess at the end of the trial whether the confession, viewed in conjunction with the other evidence, incriminated the defendant so as to entitle him to a new trial; or (2) conduct a pretrial hearing at which both the prosecution and the defense would be required to reveal the evidence they planned to introduce. *Id.* As the Court observed in *Richardson*, both approaches open the door to manipulation by the defense, numerous mistrials and appeals, and overall judicial inefficiency. *Id.*

Third, prohibiting the use at joint trials of confessions that are not facially incriminating would result in fewer joint trials, thereby exacting a significant toll on the trial's participants and society as a whole. Separate trials of codefendants necessitate that the prosecutor repeatedly present the same evidence. The attendant inconvenience, trauma, and, sometimes, danger to victims and witnesses is not insignificant. *See id.* at 210. And, the last-tried defendant is "randomly favored" by "knowing the prosecution's case beforehand." *Id.* This Court has expressed its preference for joint trials because they play a "vital role in the criminal justice system . . . by enabling a more accurate assessment of relative culpability." *Id.* at 209-10. Moreover, joint trials "promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993), *quoting Richardson*, 481 U.S. at 210; *see also United States v. Lane*, 474 U.S. 438, 449 (1986) (joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial"), *quoting Bruton*, 391 U.S. at 134.

The alternative of using multiple juries, suggested by Gray's amicus, (NACDL Amicus Br. 15), could likewise lead to inconsistent verdicts, and has other drawbacks, as well.[5] The procedure can impose an inordinate burden on

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[5] Numerous lower courts have disapproved of using multiple juries in a single trial. *See, e.g., Beam v. Paskett*, 3 F.3d 1301, 1304 (9th Cir. 1993) (multiple juries increase complexity and likelihood of error, and impair each defendant's ability to present a defense), *cert. denied*, 511 U.S. 1060

the trial court in coordinating the two juries, maintaining their segregation, and ensuring their equal treatment. The technique may entail separate jury venires, instructions to the juries not to communicate, courtrooms large enough to accommodate multiple juries, excessive moving of the juries in and out of the courtroom, separate sets of jury instructions, duplicate exhibits, and staggered verdicts. And, inasmuch as certain procedures, such as opening statements, closing arguments, and cross-examination of

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(1994); *United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972) (expressing disapproval of use of two-jury trials), *cert. denied*, 409 U.S. 1127 (1973); *People v. Rainge*, 445 N.E.2d 535, 551 (Ill. App. 1983) (use of dual juries should not be encouraged because of problems inherent in keeping track of "who testified before which jury, and even which jury is hearing which testimony"), *cert. denied*, 467 U.S. 1219 (1984); *State v. Watson*, 397 So. 2d 1337, 1342 (La.) (discouraging use of dual juries absent criminal procedure guidelines), *cert. denied*, 454 U.S. 903 (1981); *Scarborough v. State*, 437 A.2d 672, 674-76 (Md. App. 1981) (condemning use of dual juries because "all the risks inherent in the traditional jury system become two-fold"), *cert. denied*, 292 Md. 639 (1982); *Ewish v. State*, 871 P.2d 306, 316 (Nev. 1994) (instructing lower courts to refrain from dual jury trials absent guidelines or statutes because such trials are administratively cumbersome and "a breeding ground for curious results, tainted justice, and issues for appeal"); *State v. Corsi*, 430 A.2d 210, 213 (N.J. 1981) (recommending against using dual jury procedure, noting it is exception rather than rule); *People v. Ricardo B.*, 535 N.E.2d 1336, 1339 (N.Y. 1989) (holding that multiple juries are exception, not rule, and "are to be used sparingly and then only after a full consideration of the impact the procedure will have on the defendants' due process rights").

particular witnesses would have to be repeated for the benefit of each jury, the defense attorney going last will benefit from knowing what to expect.

Finally, to forgo the use of codefendant confessions altogether in such situations is too dear a price to pay in view of "society's compelling interest in finding, convicting, and punishing those who violate the law." *Richardson*, 481 U.S. at 210, *quoting Moran v. Burbine*, 475 U.S. 412, 426 (1986). "[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977). Indeed, excluding constitutionally valid confessions from the purview of the jury distorts the fact-finding and truth-seeking processes at the heart of the judicial system. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (evidence violative of *Miranda v. Arizona*, 384 U.S. 436 (1966), is inadmissible in prosecution's case-in-chief but admissible for impeachment purposes; impeaching material would provide valuable aid to jury in assessing defendant's credibility); *see also Moran v. Burbine*, 475 U.S at 427 (expanding *Miranda* rules to require police to inform suspect of status of legal representation is unnecessary for protections of Fifth Amendment privilege and "would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt"); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (system of justice has strong interest in "making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce"); *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by

Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

The compelling reasons set forth in *Richardson* for permitting redaction notwithstanding possible contextual linkage were critical to the result in that case. Those considerations apply equally to this case and dictate the same conclusion.

C. A Codefendant's Confession Redacted by Substituting Blanks or Neutral References for the Defendant's Name Does Not Facially Incriminate the Defendant.

Although the Court in *Richardson* reserved ruling on the admissibility of confessions in which the defendant's name has been replaced by a symbol or neutral pronoun, 481 U.S. at 211 n.5, the reasoning of that case logically extends to confessions redacted in that manner. So long as a proper limiting instruction is given, the *Bruton-Richardson* doctrine plainly permits the use at trial of a confession redacted to include only neutral references to codefendants. A statement in which the name of the defendant has been deleted or replaced with some nonspecific term does not "expressly" or "facially" incriminate the defendant within the contemplation of the doctrine.

Bell's redacted statement did not facially incriminate Gray. The statement did not name Gray as a participant in the crime, nor did it contain references to the functional equivalent of his name, i.e., any information that readily and unmistakably identified him as one of the persons referred to as "deleted" or "deletion." The copy of the

statement admitted into evidence had blank white spaces where the names once appeared. (J.A. 65-68). The statement merely informed the jury that others, besides the declarant, were at the scene and involved in the incident.

Gray and his amicus nevertheless complain that Bell's confession should have been redacted to eliminate all references to his existence, as was done in *Richardson*. (Pet. Br. 12-14; NACDL Amicus Br. 12-14).[6] Gray, however, never suggested a *Richardson* redaction and, indeed, voiced no objection to the method of redaction directed by the trial court, despite ample opportunity to do so. (Tr. 6/17/94, at 52-56; Tr. 6/20/94, at 33-35; Tr. 6/21/94, at 252; Tr. 6/22/94, at 4-5).[7]

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[6] Gray and his amicus also take issue, for the first time in this Court, with the fact that the names of Gray and Tank were concealed by white-out, because that method of redaction signaled to the jury that names had been omitted. (Pet. Br. 12-14; NACDL Amicus Br. 11). This charge is groundless. A jury's awareness that names have been redacted from a confession is not tantamount to a conclusion on its part as to *whose* names have been omitted.

[7] Notwithstanding the trial court's suggestion that the prosecutor and defense counsel confer on the best way to redact the statement, (Tr. 6/17/94, at 52), defense counsel hewed to her "all-or-nothing" position that severance was required or, in the alternative, that the entire statement should be excluded, (Tr. 6/17/94, at 4-5, 45-46, 54-55). When the trial court asked defense counsel whether she agreed to the proposed redaction, counsel, knowing full well that the redaction would consist of whiting out the names of Gray and Tank, replied, "As a lesser evil I think it needs to be redacted." (Tr. 6/20/94, at 33).

In any event, that this Court in *Richardson* approved one particular method of redaction does not mean that all other methods of redaction are prohibited. The relevant inquiry is not whether one method is more favorable to the defendant than another, but, rather, whether the method employed satisfies constitutional dictates. *See Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). In an analogous context, this Court has ruled that there are no "categorical evidentiary prerequisites" to satisfying the Confrontation Clause. *Maryland v. Craig*, 497 U.S. 836, 860 (1990). Thus, contrary to the suggestion of Gray and his amicus, the Confrontation Clause does not mandate that the radical redaction used in *Richardson* be performed in every case.

Indeed, the redaction approved in *Richardson* may not be appropriate in all cases. "[T]he deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government." *Bruton*, 391 U.S. at 143 (White, J., dissenting). Redaction that requires substantial rewriting of the document may be at odds with the common law doctrine of completeness embodied in Federal Rule of Evidence 106. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (where part of document is admitted, rule of completeness requires admission of other portions of document that are necessary to avoid confusion or distortion); *United States v. Nobles*, 422 U.S. 225, 231 (1975) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."), *quoting United States v. Nixon*, 418 U.S. 683, 709 (1974).

The goal of the Confrontation Clause is to advance the integrity of the truth-determining process in criminal trials by ensuring that the trier of fact has sufficient information

to "find the truth." *See Bourjaily v. United States*, 483 U.S. 171, 182 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970). "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *James v. Illinois*, 493 U.S. 307, 311 (1990), *quoting United States v. Havens*, 446 U.S. 620, 626 (1980). Redaction that creates confusion and distortion runs counter to these truth-seeking objectives.

To ensure that evidence is presented to the jury as completely and accurately as possible, trial courts must be permitted to exercise their discretion to determine which method of redaction best achieves that goal, taking into account such factors as the length of the statement, whether it was written, audiotaped or videotaped, the ease with which redaction may be accomplished, and local trial practices. The weight a jury affords a confession may well depend on its form and wording, and the process of redaction should not distort the jury's ability properly to evaluate it. So long as the redaction produces a statement that does not facially incriminate the nonconfessing defendant, it comports with Sixth Amendment dictates.

Maryland, like amicus for Gray, believes this Court can draw a "principled and practical" line, (NACDL Amicus Br. 3), between confessions that satisfy the *Bruton-Richardson* doctrine and those that do not. Maryland, however, believes that the line should be drawn at a different place. Under Maryland's proposed rule, codefendant confessions that do not name or otherwise identify the defendant in such a way as to be the functional equivalent of the defendant's name are admissible at joint trials, so long as the jury is instructed to consider the statement only against the confessing

defendant. This rule is clear, easy to apply, and is consonant with the goals of the Confrontation Clause.

D. The Trial Court's Cautionary Instruction to the Jury Not to Consider Bell's Confession Against Gray Ensured that the Jury Would Properly Limit Its Consideration of that Evidence.

Removing Gray's name from Bell's confession enabled the jury to follow the trial court's instruction to consider Bell's confession solely against Bell. Unlike the situation in *Bruton*, where the jurors were confronted with the defendant's name and then told to "wipe it from their brains," *see* 391 U.S. at 129, Gray's jury was not called upon to ignore a vital piece of evidence to which its attention had just been directed. As this Court observed in *Richardson*, "the calculus changes when confessions that do not name the defendant are at issue." 481 U.S. at 211. "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." *Id.* at 208. When a confession is redacted to eliminate the defendant's name, thereby rendering any incrimination merely inferential, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.*

Here, the trial court instructed the jury, both when the statement was admitted into evidence, (J.A. 10), and at the close of all the evidence, (J.A. 14, 18), not to consider Bell's confession as evidence against Gray. The court also admonished the jury generally to consider the evidence only as it related to the defendant against whom it was

admitted. (J.A. 14). These instructions, coupled with the redaction that omitted Gray's name from Bell's confession, ensured that the confession would be considered for the limited purpose for which it was admitted.

The jury's task in this regard was not particularly difficult to perform. In *Richardson*, this Court catalogued several analogous, and even more difficult, situations in which juries routinely are called upon and expected to follow instructions to consider evidence for one purpose but not another, or against one defendant but not a codefendant. *See* 481 U.S. at 206-07 (collecting cases). Since *Richardson*, this Court has continued to adhere to the presumption that juries can and do follow limiting instructions. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (admission of evidence in capital case regarding defendant's prior death sentence did not deprive defendant of fair sentencing proceeding because trial court's instruction explicitly precluded jurors' consideration of prior sentence as aggravating factor); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (concern that other crimes evidence posed danger of prejudice mitigated by trial court's instruction to jury to consider similar acts evidence only for limited purpose for which it was admitted). Surely a jury that can consider a defendant's prior convictions only as they relate to his credibility can follow an instruction not to link a defendant to evidence that, on its face, does not even mention him.

This Court has held that a defendant's *Miranda*-violative confession can be used for impeachment of the defendant's credibility, but not as substantive evidence. *Harris v. New York*, 401 U.S. at 225-26. Implicit in this holding is the assumption that juries can follow an instruction to ignore a defendant's confession in deciding his guilt or innocence.

If juries can be counted on to accomplish that feat, they certainly can follow the kind of instruction that was given in Gray's case.[8]

Gray and his amicus have no quarrel with the limiting instruction given in this case. They do argue, however, that the instruction was undermined by the prosecutor's rebuttal closing argument, the order in which she posed her questions to Detective Pennington, and the fact that she adduced evidence that Gray owned a "Park Heights" jacket. They claim that the prosecutor "linked Petitioner to codefendant Bell's redacted confession," (Pet. Br. 15 n.17), by "explicitly connecting Bell's statement to Gray's arrest," (NACDL Amicus Br. 12-13). Amicus argues that

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[8] Amicus for Gray cites two empirical studies that have found that juries generally misunderstand and thus are incapable of following trial courts' instructions. (NACDL Amicus Br. 4 n.3). Notwithstanding these and other studies which, over the years, have stated this as a general proposition, this Court, as discussed in the text above, consistently has adhered to the belief that juries can and do follow limiting instructions. Were this body of social science research to be accepted, the entire foundation of the jury system would collapse. As this Court stated in *Richardson*, the presumption that juries follow instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." 481 U.S. at 211; *see also Gacy v. Welborn*, 994 F.2d 305, 314 (7th Cir.) ("The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries."), *cert. denied*, 510 U.S. 899 (1993).

this "prosecutorial manipulation" of the evidence "guaranteed that the cautionary instruction was ineffective." (*Id.*). This contention, made for the first time in this Court,[9] is belied by the record.

When read in context, the portion of the prosecutor's rebuttal closing argument to which Gray refers in no way linked Gray with Bell's confession. The remarks merely alluded to the testimony of two prosecution witnesses, Shay Yarberough and Tracey Brumfield, placing Gray at the scene of the crime. The fact that the prosecutor mentioned portions of Bell's redacted confession in conjunction with evidence that Gray was among the group of men involved in the beating was not impermissible "linkage"—but was, instead, appropriate closing argument. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (court should not readily infer most damaging meaning from prosecutor's ambiguous remark, nor conclude that "a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

Gray's challenge to the propriety of the prosecutor's

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[9] At trial, Gray did not object to either the prosecutor's comments, (J.A. 50-51), or the direct examination of Detective Pennington, (Tr. 6/22/94, at 33), and lodged only an untimely general objection to the prosecutor's eliciting of evidence concerning the "Park Heights" jackets, (Tr. 6/21/94, at 125, 206). Nor did Gray raise, brief, or argue these points in the state appellate courts or in his petition for writ of certiorari in this Court. Thus, none of these claims is properly before the Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992) (issue not raised in or addressed by state courts nor raised in petition for certiorari not properly before Court).

direct examination of Detective Pennington also misses the mark. Amicus for Gray maintains that the prosecutor created the impression that information provided to the police by Bell led directly to Gray's arrest, thereby linking Gray to the deletions in Bell's confession. (NACDL Amicus Br. 12-13). On the contrary, the context of the detective's testimony shows that the sequence of the questions related chronologically to the phases of the investigation, not to any nexus between Bell's confession and Gray's arrest.[10]

Finally, Gray's amicus takes issue with the fact that the prosecutor "elicited testimony from witnesses linking Gray to a jacket emblazoned with 'Park Heights,'" thereby ensuring that the jury would connect him with Bell's confession, which made mention of such jackets.

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[10] Detective Pennington testified that Gray was developed as a suspect and an arrest warrant was obtained for him *before* Bell was ever questioned. The detective testified that on January 11 and 13, 1994, he interviewed Tracey Brumfield and Shay Yarberough, who identified Gray, Bell, and Tank as participants in the beating. (Tr. 6/22/94, at 15-16). Based on that information, Detective Pennington obtained arrest warrants for Bell and Gray. (*Id.* at 16-17). The police arrested and interrogated Bell the next day but could not locate Gray until January 19. (*Id.* at 17, 33). Because Bell was the first suspect to be interrogated, the prosecutor naturally questioned Detective Pennington first about Bell's statement. (*Id.* at 18-33). The prosecutor then made the transition from Bell's statement to Gray's statement, which Gray gave to the police five days later: "All right, now, officer, after [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" (*Id.* at 33).

(NACDL Amicus Br. 13). In the first instance, Bell's reference to the Park Heights jacket was, in and of itself, wholly innocuous. He stated simply that "deletion" owned such a jacket. (J.A. 12, 56). Furthermore, that the prosecutor adduced testimony that Gray himself owned a Park Heights jacket did not compel the inference that Gray was the jacket owner referred to in the confession. For all the jury knew, a number of people had such jackets and there is no reason to assume they were all present at the crime scene. Even more to the point, the prosecutor did not argue to the jury in closing that Gray's Park Heights jacket linked him to Bell's confession.

Thus, the alleged linkage about which Gray and his amicus so strenuously complain was nonexistent. Under their theory that every piece of prosecution evidence improperly "linked" Gray to Bell's confession, the prosecutor would be foreclosed from adducing *any* evidence tending to establish Gray's involvement in the beating, lest it be considered to subvert the redaction and its accompanying jury instruction. Forcing the prosecution to try its case in such a straightjacket surely was not an intended outcome of *Richardson*.

E. Even Under a Contextual Implication Analysis, It Was Not Overwhelmingly Probable that the Jury Would be Unable to Follow a Limiting Instruction Not to Consider Bell's Statement Against Gray.

Even if this Court were to apply a contextual implication analysis to this case, the judgment below should be affirmed. As redacted, the confession does not

specify the number of named participants in the crime.[11] But even assuming that the jury inferred from the confession that Bell had named only two people, all of the evidence implicated Bell and *five* others in the commission of the crime, any two or more of whom could have been the persons referred to in the statement as "deleted" and "deletion." Redaction that substitutes pronouns or similar neutral and nonidentifying terms for the name of a codefendant accords with the *Bruton-Richardson* doctrine if the crime was committed by a number of people, any one of whom could have been the coparticipant mentioned in the confession.[12] Because the evidence indicated that

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[11] In fact, the redacted confession did not make clear that Bell named *only* two other people in his confession. It is true that a jury bent on disregarding the limiting instruction might have been able to infer that Bell named *at least* two persons, because there are places where the manner of redaction would have permitted the jury to infer that at least two different names were given. (J.A. 10-12, 65-68). But there would have been no way for the jury to know who Bell referred to at various other points where the words "deleted" and "deletion" were used, and thus there is no way to tell from the redacted confession precisely how many people Bell named as having been involved in the assault.

[12] Many lower courts embrace this logic. *See, e.g., United States v. Washington*, 952 F.2d 1402, 1404-05 (D.C. Cir. 1991) (use of indefinite pronoun or other general term in place of name of defendant did not create "inevitable association with" the defendant because terms could just as easily have been referring to one of two other persons involved in charged offense), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Donahue*, 948 F.2d 438, 444 (8th Cir. 1991) (references in

five individuals besides Bell participated in the crime, the redacted confession did not automatically compel the conclusion that Gray was among them.

Moreover, the prosecution's theory at trial was that Bell's statement to the police was self-serving and, therefore, untrustworthy inasmuch as he minimized his own involvement in the crime. (Tr. 6/23/94, at 125-26). The prosecutor urged the jury to disbelieve those self-

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codefendant's confession to "everyone" and "they" did not expressly implicate defendant and so it was not overwhelmingly probable that jurors would not be able to follow instructions to consider statement against declarant only), *cert. denied*, 503 U.S. 976 (1992); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir.) (reference to "we" in codefendant's confession could just as easily have referred to one group of defendants as to another; defendant must be directly implicated "by being specifically identified [in the statement] or by being the only other participant in the charged crime"), *cert. denied*, 498 U.S. 863 (1990); *People v. Fletcher*, 917 P.2d 187, 195 (Cal. 1996) (substituting pronouns or other nonidentifying terms for defendant's name complies with defendant's confrontation right if crime was committed by number of people); *Harris v. State*, 462 S.E.2d 425, 427 (Ga. App. 1995) (statement redacted by replacing defendant's name with "someone" did not directly implicate defendant, inasmuch as there were six or seven persons present when crime was committed, any one of whom could have been the "someone" who committed crime); *Commonwealth v. Rawls*, 419 A.2d 109, 112-13 (Pa. Super. 1980) (where references to two other defendants were replaced with words "other fellows," "they," "someone," and "one of the guys," statement was not powerfully incriminating to defendant because it alone did not serve to connect him with crime), *appeal dismissed*, 452 A.2d 1347 (Pa. 1982).

serving aspects of Bell's confession and to credit instead the State's evidence showing Bell's leadership role in the beating. (*Id.* at 126-27; Tr. 6/21/94, at 114, 119). For his part, Gray claimed that he was near the scene at the time of the crime, but did not participate in its commission. He and his defense witnesses testified that he was talking with his girlfriend at a pay telephone while the beating occurred.

Thus, not only did the jury hear that much of Bell's confession was not to be trusted, they heard two very different versions of Gray's complicity in the crime: the State's, putting Gray at the heart of the affray, and Gray's, not denying that the crime occurred and that Bell and others participated in it, but denying that he, Gray, was one of those persons. The evidence in its entirety, then, did not impel the jury to disobey the judge's instruction and insert Gray's name into Bell's confession.

But, even assuming the jury had been inclined to head down "the inferential path" the instruction was designed to avoid, and to speculate about the identity of the deleted persons, it still does not follow that the jury would necessarily have substituted Gray's name for "deleted." The actions attributed to the persons whose names were deleted from the confession were not so distinctive as to compel the jury to match that conduct with Gray by resorting to other evidence identifying him with that conduct. Bell merely alleged in his confession that "deleted" and "deletion" were among a group of men who chased, hit, and kicked the victim. (J.A. 11, 55).

Although there may be situations where a contextual implication approach would yield a contrary result, this is not one of them. Given the nature of the crime, the multiple participants, the manner of redaction, and the

presentation of evidence at trial, Gray's right of confrontation was adequately protected.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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